United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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To be argued by
NEAL J. HURWITZ

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

HARRY KURZER,

Appellee.

On Appeal From a Judgment of the United States District Court for the Southern District of New York

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE KURZER

PRELIMINARY STATEMENT

Appellant appeals from an order entered on September 8, 1975 in the United States District Court for the Southern District of New York by the Hon. Morris E. Lasker, United States District Judge, granting a motion by the appellee, Harry Kurzer, to dismiss the indictment as to him. The government also appeals from an order of Judge Lasker entered on November 12, 1975, adhering to his order of dismissal on rehearing and reargument.

Indictment 74 Cr. 288, filed on March 21, 1974, charged Kurzer and two others in three counts with aiding and abetting in the filing of false and fraudulent federal corporate income tax returns in violation of 26 U.S.C. §7206(2). Kurzer moved to dismiss the indictment as to him on the ground that the government had procured it by use of testimony and information given by appellee under a grant of immunity pursuant to 18 U.S.C. §§6002 and 6003. After an evidentiary hearing on February 6 and 7, 1975, Judge Lasker, on September 8, 1975, dismissed the indictment finding that the government had failed to demonstrate that it did not use Kurzer's immunized statements in obtaining the indictment.

The government filed a motion for reargument, and after holding a second evidentiary hearing on November 5, 1975, Judge Lasker, on November 12, 1975, granted the motion for reargument and adhered to his view that the indictment should be dismissed.

INTRODUCTION

During 1972 appellee, Kurzer, after asserting his Fifth Amendment right not to incriminate himself, was granted use and derivative use immunity by both the New York County District Attorney's office and the Justice Department's strike force for the Southern District of

New York. Initially, these grants were given informally by each of the prosecutive agencies. Kurzer met with the members of the staff of the District Attorney on two occasions and later in the year he conferred at length on four occasions with members of the federal strike force. On February 26, 1973 Kurzer testified pursuant to a formal grant of immunity before a federal grand jury, which approximately two weeks later indicted an individual named Moe Steinman for various tax violations. Kurzer's testimony had been used to procure the indictment against Steinman.

In August of 1973, Mr. Steinman agreed to cooperate with the federal authorities and then for the first time, according to the testimony of government agents at the first evidentiary hearing, Steinman told the government about the acts alleged in the indictment naming Kurzer. Thus, "by the Government's own admission, the first implicating information concerning Kurzer came from a man who was indicted in part on the basis of Kurzer's testimony" (A. 359).* Moreover, Judge Lasker found as a fact, and it was admitted to by the government at the hearings, that it did not have any lead to incriminating evidence against Kurzer prior to granting him immunity. Judge Lasker held, therefore, pursuant to

* "A." refers to the Appellant's Appendix.

Kastigar v. United States, 406 U.S. 441 (1972), that

> "... the use of Kurzer's testimony decidedly has not left him in the same position he would have been in had he claimed his privilege under the Fifth Amendment. The Government has not proven, as it must, that Kurzer would have been indicted had he never given information to Government agents or testified before the Grand Jury. There is no question that Kurzer's information and testimony set in motion the train of events which ultimately resulted in his own indictment." (A. 473)

STATEMENT OF FACTS

First Hearing

The government had the burden of demonstrating that it made no direct or indirect use of Kurzer's immunized statements. Franklin Snitow, Assistant District Attorney, New York County, testified that the investigation by his office into the meat industry began in March 1971. During the summer of that year the Southern District of New York strike force joined in (A. 16-18). Mr. Snitow first met Kurzer in January 1972 and, on direct examination, Snitow testified that he conferred with Kurzer on two occasions, in January and on April 18, 1972 (A. 18-27). On cross, however, Snitow testified there were at least three occasions he met with Kurzer (A. 53-56). The interview in January concerned the destruction in December 1971 of books and

records of Transworld Fabricators (Transworld), a corporation in which Moe Steinman was associated, and Kurzer's role as the accountant for Transworld (A. 20-23). The meeting of April 18 primarily concerned Kurzer's preparation of Herbert Newman's personal tax returns. Kurzer may also have mentioned the names of various other meat firms for which he did accounting work (A. 34). Mr. Snitow further testified that no mention was made of Northern Boneless, Peter Pfeiffer, G & M Packing or Ben Moskowitz (A. 24-25). On cross, Mr. Snitow said Detective Nicholson might have asked Kurzer about cash going to Moe Steinman and Transworld, which cash was being used for distribution to others. Nicholson also might have asked about the destruction of purchase invoices of Transworld and why these invoices, and not other records, were destroyed in December 1971 (A. 57-58).

In the summer of 1972, the federal authorities contacted Kurzer, who in turn called his attorney, Neal Hurwitz. On August 7, 1972 Mr. Hurwitz spoke to strike force agent Sontag, who advised that the government wanted Kurzer to testify against Moe Steinman and that Kurzer was not a target. Mr. Hurwitz replied that he would not allow Kurzer to make any statements and that Kurzer would assert his Fifth Amendment privilege against self-incrimination unless the government granted Kurzer use immunity. On the same day Mr. Hurwitz conferred with William Aronwald and it was agreed that Kurzer would be granted use immunity (A. 302-04).

The government's brief at page 5 appears to state that the understanding between Mr. Hurwitz and Mr. Aronwald was to the effect that Kurzer may have received something less than use and derivative use immunity pursuant to §§6002 and 6003. If so, then this is the first time the government has put forward this contention.* Suffice it to say that the record is crystal clear that Kurzer was granted both use and derivative use immunity. For example, the following colloquy occurred during Mr. Aronwald's testimony:

> The Court: So to put it bluntly, you do agree with Mr. Hurwitz' claim that whatever Mr. Kurzer said in any of the meetings with any of you cannot be used against him?
>
> Mr. Aronwald: That's correct, sir.

---

* The government's brief states at page 5 that the agreement between Mr. Aronwald and Mr. Hurwitz was that if the government felt that Kurzer was being truthful after he was fully debriefed by government agents then he would formally receive use immunity. On the other hand, if the government felt that Kurzer was not being truthful he would not formally receive immunity and in such event whatever Kurzer said during the course of the interviews would not be used against him. The government relies on Mr. Aronwald's testimony for this interpretation of the agreement; yet even he testified that after the first Kurzer interview with the government in August 1972 Mr. Aronwald advised Mr. Hurwitz that he would grant formal use immunity to Kurzer (A. 272). Mr. Hurwitz disputed Mr. Aronwald's understanding of the terms of the agreement in his testimony by stating that he did not leave it in the prosecutor's discretion to determine whether or not Kurzer was telling the truth (A. 303-04). In any event, both sides were in agreement that the immunity granted was that contained in 18 U.S.C. §§6002 and 6003 and that the teachings of Kastigar v. U.S. would be the test (A. 269-70). Indeed, Judge Lasker's opinion states that "The government concedes that such an informal grant prevents use of information received from Kurzer to the same extent as a formal grant" (A. 356).

The Court: That issue is at least clear and agreed.

Am I correct that in your opinion, as a lawyer now, not as a witness -- you can comment on this, Mr. Hurwitz, if you wish to -- the issue to be decided by me depends on what I find to have been the facts as to what he did discuss with you and your colleagues during these various meetings?

Mr. Aronwald: No, your Honor. I think that is one of the issues.

But as I indicated yesterday, I believe the second issue is whether or not, assuming he did say anything relating to the facts of this indictment, whether or not what he said was used against him in connection with the procuring of this indictment.

I believe that is what Kastigar deals with.

The Court: Right. I should have added that.

Mr. Hurwitz: I would not disagree.

I would agree to a great degree with what your Honor says. However, your Honor, one of the key factors here would be -- and since the Government has the burden, and I think it's a heavy burden, of affirmatively showing your Honor that no use, direct or derivative use --

The Court: Right.

Mr. Hurwitz: That's where I will put my finger on it. It's not only what he said, but what leads may have come from it.

Mr. Aronwald: I agree with that.

The Court: That's a matter of law. I think we all agree that Kastigar requires that. (A. 269-70) [Emphasis added]

Mr. Kurzer and Mr. Hurwitz appeared at the strike force offices for four lengthy interviews which were conducted almost entirely by IRS agents. The dates of the interviews were August 17, September 13, December 1, and December 13, 1972. At these interviews hundreds and hundreds of topics were discussed, most of which the witnesses could not recall (A. 304-06). No notes were taken during these interviews. Indeed, in terms of recollection as to what was said and what occurred at these meetings, the government's main witness, Agent Pangis, did not even remember at all that a six-hour conference occurred on August 17th.* It was he who also testified that meetings took place with Kurzer in January and February 1973, but he had no notes or entries in his diary to reflect such meetings (A. 111-15; 164-65). Other testimony revealed clearly that no such interviews with Kurzer even took place (A. 309). A second IRS agent (Mann), who was involved in the questioning of Kurzer, also forgot about the August 17th interview completely until a day before he took the witness stand (A. 216-17). No government witness testified about the session which occurred on September 13.

---

* Pangis testified on direct that the first time he met Kurzer was on December 13, 1972 at the strike force offices and that the first time anyone at the strike force interviewed Kurzer was on December 1 when he was not present (A. 111-15). On cross, Pangis reiterated that the first interview he was present at with Kurzer was on December 13 (A. 132-33). On being asked to look at his diary for August 17, 1972, he, for the first time, noticed that Kurzer's name appeared on that date. The August 17th interview lasted six hours (A. 133, 138).

At these lengthy interviews, discussions took place about Kurzer's background in the meat industry, the names of his clients, including G & M and Northern Boneless, both of which companies are alleged to be involved in the scheme to which the instant indictment relates (A. 304-07). There was discussion in these interviews about how Moe Steinman and Transworld, both involved in the instant indictment, were generating cash and what methods were used to accomplish it. Mr. Hurwitz testified that he believed that phony invoicing and double invoicing were mentioned, but he could not recall whether mention was made about the invoicing scheme alleged in the instant indictment concerning co-defendants Northern Boneless and Peter Pfeiffer, but it may well have taken place (A. 306-07). Every single item in the corporate returns of Transworld was discussed (A. 317).

The two IRS agents who testified remembered very little as to what was in fact said,* except they were certain

* In cross-examination, after testifying that his recollection was exhausted as to what was discussed at the various conferences, Pangis' memory was refreshed by defense counsel as to the following areas of discussion: when Kurzer first began his association with the Steinmans, the various books and records of the Steinman companies, who prepared the entries, what Kurzer's duties were, the preparation of individual income tax returns, the examination of Kurzer's diaries and other records and discussions about various clients of Kurzer in the meat industry (A. 151-55). Pangis remembered that he asked Kurzer about anything and everything on the corporate return and if he felt it was insignificant, the matter would mean nothing to him and he would not remember it (A. 157-58). Further, on cross, Pangis' memory had to be refreshed in the following areas: cash being "pulled out" of Transworld by Moe Steinman and putting expenses on the books to generate cash (A. 159-60); the destruction of corporate invoices and other means by which Moe could take money out of the corporations (A. 161-62); and invoices and commissions taken as expenses by Transworld (A. 172).

that there was no discussion at all with respect to any of the facts pertaining to the scheme alleged in the instant indictment (A. 125-26; 206-07). Judge Lasker nevertheless found that Kurzer gave no information on the invoicing scheme as alleged in the present indictment (A. 357).

Subsequent to the last interview of Kurzer on December 13, 1972, Kurzer testified before a federal grand jury on February 26, 1973, at which time he was formally granted immunity (A. 309; 276). His testimony related to business expense deductions and payroll falsifications as to certain corporations in which Moe and Sol Steinman had interests, including Transworld. On the basis of the testimony of Kurzer and others, the grand jury, on March 17, 1973, indicted Moe Steinman and others (A. 293).

In the summer of 1973 the government first learned of the scheme alleged in the instant indictment from Moe Steinman who, following his indictments in March 1973, decided to cooperate with the government (A. 278-79). Mr. Aronwald testified that the only sources of proof which led to the instant indictment against Kurzer were Steinman's testimony and the results of subsequent inquiries conducted as a direct result of Steinman's information (A. 278-80).

On September 8, 1975, Judge Lasker granted Kurzer's motion to dismiss the indictment. Judge Lasker held that in light of the facts adduced at the hearing the government did not demonstrate "that it did not use Kurzer's immunized

testimony 'directly or indirectly' or 'for any purpose' to obtain the present indictment" (A. 358). The Court further stated:

> The chain of evidence from Kurzer to Steinman and back to Kurzer thus violates the broad statutory proscription on its face and as construed by Kastigar. Our disposition of the matter is consistent with the opinions of those courts which have construed the immunity statute since Kastigar, all of which have interpreted it most favorably for the defendant and against the government. See United States v. First Western State Bank of Minot, N.D., 491 F.2d 780, 783 (8th Cir. 1973); United States v. McDaniel, 482 F.2d at 305, 311 (8th Cir. 1973) and United States v. Dornau, supra, 359 F.Supp. at 687. (A. 359-60).

Second Hearing

The government moved for reargument and reconsideration on the principal ground that it would be able to show that Moe Steinman gave information against Kurzer not because of Kurzer's cooperation against him but for wholly independent reasons. As Judge Lasker stated in his opinion dated November 12, 1975, this evidence could, and should, have been presented at the original hearing; nevertheless he felt that in the interests of justice, he would grant a rehearing so that "the court could be certain of acting on the fullest information" (A. 471). Moe Steinman's

attorney, Elkan Abramowitz, testified that in March 1973, after the filing of state and federal indictments against Steinman,* a meeting occurred between him and government attorney Aronwald concerning possible cooperation (A. 371-72). Steinman later advised Mr. Abramowitz that he would not cooperate since he felt he had a chance of winning (A. 373). In or about June or July 1973 Steinman told Mr. Abramowitz that he heard from various sources that the grand jury was investigating certain cash transactions between Steinman and persons in the meat industry. Mr. Abramowitz further testified that Steinman felt he had no defense to these new allegations. On August 14, 1973, Mr. Abramowitz entered into an agreement with the government (Gov't Ex. 1, A. 467-69) which provided that Steinman would cooperate fully with the government. Steinman's later testimony against Kurzer formed part of this cooperation and procured Kurzer's indictment in the instant case (A. 374-79).

On cross-examination, Mr. Abramowitz stated that the payroll indictment, which Kurzer's testimony helped bring about, contained 99 counts and named four defendants: Moe Steinman, his brother Sol, Walter Bodenstein, Moe's son-in-law, and Herbert Newman, who was deceased (A. 382-83). Mr. Abramowitz also stated that the March 1973 indictments

* Kurzer's testimony had been used to obtain one of the March 1973 federal indictments; it was referred to at the hearing as the "payroll padding" indictment.

were the first criminal charges ever brought against Steinman although he had been investigated on more than one occasion by various local and federal prosecutors and had been the subject of a Congressional investigation (A. 384-86).

Mr. Abramowitz further testified that Steinman told him that the payroll indictment had to be dismissed as to his brother Sol and son-in-law before he would co-operate. Initially Steinman wanted all pending charges dismissed as to him without any plea by him to any charge. When that was rejected by the government Steinman next offered to plead to one count of the payroll indictment which was also turned down (A. 389-92). Steinman eventually pleaded guilty in 1974 to a wholly new charge.

Mr. Abramowitz also testified that he advised Steinman that if he went to trial and were found guilty on the payroll indictment, the judge would undoubtedly send him to jail. He further advised that a jury may well find him guilty of these charges (A. 393-94).

Mr. Abramowitz further said that he was aware that Kurzer testified in the grand jury but did not know he was going to be a witness for the government at trial. However, he later said he was not aware that Kurzer testified in the grand jury but he knew that Kurzer was interviewed by the strike force (A. 395).

Mr. Abramowitz stated that the payroll indictment played a part in Steinman's plea negotiations, and the agreement entered into with the government provides that the payroll indictment will be nolle prossed (A. 398-99; 467-69).

William Aronwald testified that there was overwhelming evidence that Moe Steinman and the other defendants named in the payroll indictment committed the crimes alleged, and that in his view, the government would have been victorious at trial. Additionally, Aronwald stated that Kurzer would have been a witness for the government at this trial as to certain admissions made to him by Moe Steinman (A. 429-30).

Moe Steinman testified that after the indictments were filed in March 1973, his attorney asked him whether he would cooperate and, "I laughed at him," and said, "I got nothing to cooperate" (A. 448-49). After he heard that the government had evidence concerning cash kickbacks paid to him, he called his attorney and told him about this new proof about which he had previously not told his attorney. He then ordered Mr. Abramowitz to go down and talk with the government about cooperating (A. 452-54). As part of the deal he wanted everybody to go free, including himself. He furhter testified that he did not plan to cooperate prior to hearing about this new information concerning kickbacks (A. 454-55).

On November 12, 1975 Judge Lasker filed a second

opinion, affirming his earlier order dismissing the indictment. In so ruling, Judge Lasker found that:

> We find unpersuasive the government's argument that the fact that Steinman did not commence his cooperation by fingering Kurzer as a result of or at the time of the filing of the precise indictment which Kurzer's testimony procured, alters the chain of causation. Indeed, at the evidentiary hearing on the motion for reargument, Steinman's attorney, Elkan Abramowitz, testified that the 'payroll indictment' played a part in Steinman's ultimate plea negotiations, and the agreement entered into between Steinman and the government (Government's Ex. 1) provides that the payroll indictment will be nolle prossed.
>
> We regard as artificial and unrealistic the government's attempt to compartmentalize the segments of the history of Steinman's prosecution. Whatever may have been Steinman's personal reaction to the relative strengths and weaknesses of the various charges in the indictment, nevertheless the immunized Kurzer testimony lead [sic] the government to Steinman who in turn lead [sic] the government to Kurzer. Under the circumstances we believe the Kastigar rule requires dismissal of the indictment. (A. 473-74)

ARGUMENT

POINT I

THE DISTRICT COURT'S ORDER DISMISSING THE INDICTMENT AS TO KURZER SHOULD BE AFFIRMED. JUDGE LASKER PROPERLY APPLIED THE KASTIGAR RULE, AND HIS FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS.

Appellant argues that there was no use of Kurzer's immunized statements and testimony, and therefore the district court's dismissal orders should be reversed. Specifically, the government maintains that Steinman's decision to cooperate was motivated by factors other than Kurzer's immunization and testimony. Appellee Kurzer urges, however, that the lower court's findings of fact and conclusions of law are correct, and its decision to dismiss should be affirmed. The government failed to sustain, at two evidentiary hearings, its heavy burden of showing that the present indictment was not the product of Kurzer's immunization. Therefore, Judge Lasker concluded that the

> "use of Kurzer's testimony decidedly has not left him in the same position he would have been in had he claimed his privilege under the Fifth Amendment." (A. 473)

Appellant urges here that Judge Lasker's findings of fact were in error, particularly that finding wherein he refused to accept Steinman's and his lawyer's testimony that the uncovering of the invoice scheme in the summer of 1973 was the sole reason Steinman decided to cooperate. Such a finding should not be disturbed unless it is "clearly erroneous." United States ex rel. Cannon v. Smith, Docket No. 75-2056 (2d Cir. December 18, 1975); United States v. Pfingst, 490 F.2d 262, 273 (2d Cir. 1973); United States

v. Boston, 508 F.2d 1171, 1179 (2d Cir. 1974), cert. denied, 412 U.S. 1001 (1975).

The court made the following findings after the first evidentiary hearing:

> 1) the government has failed to establish that it had information implicating Kurzer prior to granting him immunity; 2) it is undisputed that Steinman's indictment was influenced at least in part by Kurzer's statements or testimony; 3) information provided by Steinman led to the indictment of Kurzer and 4) the government has failed to establish that Steinman would have furnished such information absent his own indictment or the pressure brought upon him by the government which was caused at least in part by Kurzer's statements or testimony. (A. 360)

At the second evidentiary hearing the court allowed the government to present further evidence which the government claimed would demonstrate that Steinman's cooperation was totally independent of Kurzer's testimony and statements. The court heard testimony from Steinman, his attorney, and Mr. Aronwald, and rejected appellant's contention. There was ample evidence to support the court's finding in this regard. As the court stated in its second opinion, Steinman's attorney specifically testified that the payroll indictment, which Kurzer helped bring about, played a role in Steinman's plea negotiations, and the agreement between Steinman and the government provided that the payroll indictment would

be dismissed. Moreover, the testimony showed that the payroll indictment against Steinman was the first criminal charge ever brought against Steinman, despite several prior investigations of Steinman by prosecutive agencies. Additionally, Steinman's cooperation was dependent upon the payroll indictment being dismissed as to Steinman's brother and son-in-law. Steinman's attorney advised Steinman that if he went to trial and was found guilty, he would unquestionably be sentenced to prison. Indeed, Mr. Aronwald testified that the government's evidence in the payroll case was so overwhelming that he had little doubt that a jury would have found Steinman guilty if he had gone to trial. Thus, on the basis of the above evidence, and other facts adduced at the second hearing, the court properly rejected the government's contention that the payroll indictment played no part in Steinman's cooperation.

What appellant really urges on this court is that under the facts, Judge Lasker could decide the issues only one way as a matter of law. This is demonstrably not so, and as this court very recently stated in reviewing the findings of a district judge, after he had held an evidentiary Wade hearing:

> "At least one of us in the position of the district judge ... might not have decided the case in the same way as Judge Curtin did but that is not the issue. The question is whether the judge made any clearly erroneous

> findings of fact or incorrect conclusions of law. Finding the answer in the negative, we affirm the judgment of the district court." United States ex rel. Cannon v. Smith, supra, Slip Op. at pp. 1119-20.

The court below felt that the teachings of Kastigar v. United States, supra, required that the indictment be dismissed. In Kastigar the Supreme Court upheld the constitutionality of a "use" immunity statute against the claim that such a type of immunity violates an individual's Fifth Amendment rights. 18 U.S.C. §6002 provides, in relevant part, "No testimony or other information compelled under the order (or any testimony directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case ..."

To insure that a statutory grant of immunity does not conflict with the right not to incriminate oneself, the court held "that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination." 406 U.S. at 453. An individual must be assured that his immunized testimony will not lead to the imposition of criminal penalties. Prosecuting authorities are prohibited from using the compelled testimony "in any respect." 406 U.S. at 453. The Supreme Court gave examples of what would be included in this total prohibition on use,

specifically mentioning investigatory leads, or to focus "investigation on a witness as a result of his compelled disclosures." 406 U.S. at 460.

These strict limitations on use require the prosecutor to make a substantial showing that he did not use immunized testimony. Indeed, the Kastigar court was acutely aware of this problem since it placed a severe burden on the government.

> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. 406 U.S. at 460.

Indeed, the court later stated that a defendant need only show that he testified under a grant of immunity "in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." 406 U.S. at 461 (Emphasis added).*

The government in its brief relies heavily upon a Fourth Amendment case, United States v. Cole, 463 F.2d

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* The government's brief at page 12 states that the government's showing need only be by a preponderance of the evidence, citing several non-immunity cases. At least one immunity decision in this court states that the government's burden of showing non-use is "substantial." Goldberg v. United States, 472 F.2d 513, 516 (2d Cir. 1973). Moreover, several law review articles oppose the preponderance test. Note, 86 Harv. L. Rev. 1, 187-88 (1972); 19 Villanova L. Rev. 470, 486 (1974).

163 (2d Cir. 1972), cert. denied, 409 U.S. 942 (1973). In Cole the FBI obtained information pertaining to a possible income tax evasion charge against appellant by means of illegal wiretaps. Appellant contended that these wiretaps were the catalyst for an IRS "saturation investigation," which, he claimed, ultimately produced the evidence upon which he was convicted. However, after reviewing the record, this court upheld Judge Pollack's factual finding that it was the statement of an informant, a totally legitimate source, and not the illegal wiretaps, that initiated the request for a saturation investigation; therefore there was no "taint" shown.

Cole is inappropriate in this case. Firstly, Cole did not apply 18 U.S.C. §6002, which prohibits the use of any direct or indirect immunized testimony against a witness. This clear prohibition of use, not present in Cole, requires that an indictment be dismissed if it is "in part" based upon immunized testimony. Secondly, Cole is a Fourth Amendment case while Kurzer involved Fifth Amendment protections. Substantial policy reasons require that a different test for "taint" be applied in the area of immunity that in searches and seizures.* Moreover, in

* See Note, 86 Harv. L. Rev. at 185-89 (1972); Note, 6 Loyola of L.A. L. Rev. 350 (July 1973); Note, Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L. J. 171, 171-81 (1972).

Cole the difficulty involved in pinpointing the determinative factor in the decision to seek a saturation investigation was a much simpler task. Two parallel and distinct avenues of investigation were used, one permissible, the other illegal. The informant's disclosure and not the wiretaps formed the basis for the saturation investigation. Here no distinct avenues of inquiry were present; rather, as the court found, it was one integrated picture in which Kurzer's testimony "led" to Steinman which, in turn, "led" back to Kurzer.

This court recently decided a case, United States v. Karanthanos, Docket No. 75-1322 (2d Cir. February 2, 1976), which is similar to the facts in the present case. Karanthanos involved a search pursuant to a search warrant, which produced illegal aliens hidden in defendants' cellar. These aliens were arrested and thereafter they agreed to testify against the defendants in return for a promise that they would voluntarily be allowed to leave the country. The district court held that the search warrant was legally insufficient and therefore the search pursuant to the warrant was illegal. Since the aliens were "fruits" of the search, and their testimony was used to establish the government's case, the lower court dismissed the indictment. On appeal, this court affirmed, citing United States v. Tane, 329 F.2d 848 (2d Cir. 1964). The court stated that: "it is clear that the fact that a living witness, rather

than inanimate evidence, is derived from an illegal search does not necessarily render the witness' testimony admissible at trial."* United States v. Karanthanos, Slip Op. at 1728.

In Karanthanos, the government argued, as it does here, that there was a break in the connection between the original illegal search and the voluntary testimony of the aliens, such as to make that testimony untainted and admissible at trial. United States v. Karanthanos, supra, Slip Op. at 1727. The lower court rejected this argument, as did Judge Lasker here, and this court affirmed, holding that there was a connection between the illegal search and the testimony which the government sought to use at trial. Thus, the court stated, at Slip Op., page 1729:

> The purpose of the search as described in the application for the warrant, was to seize the illegal aliens ... Once the aliens were arrested, the INS agents had obtained considerable leverage over them, since it was within the government's discretion to prosecute and deport them ....

---

* The government argues at page 17 of its brief that the Fifth Amendment does not "protect against the use of any type of 'fruits' of compelled testimony." Certainly §6002 and Kastigar provide otherwise. But the government goes on to say that "it is all the more surprising that the testimony of a living witness [Steinman] ... should have been found by the District Court to be encompassed by the privilege." The government's surprise notwithstanding, the law is clear that a living witness can constitute a "fruit", and can be encompassed by the privilege as Judge Lasker found. See United States v. Tane, supra; United States v. Karanthanos, supra.

Similarly, in the instant case, the lower court found the government's argument unpersuasive.

> There is no question that Kurzer's information and testimony set in motion the train of events which ultimately resulted in his own indictment. We find unpersuasive the government's argument that the fact that Steinman did not commence his cooperation by fingering Kurzer as a result of or at the time of the precise indictment which Kurzer's testimony procured, alters the chain of causation... We regard as artificial and unrealistic the government's attempt to compartmentalize the segments of the history of Steinman's prosecution. Whatever may have been Steinman's personal reaction to the relative strengths and weaknesses of the various charges in the indictment, nevertheless the immunized Kurzer testimony lead [sic] the government to Steinman who in turn lead [sic] the government to Kurzer. Under the circumstances we believe the Kastigar rule requires dismissal of the indictment. (A. 473-74)

The government urges that even though Kurzer's statements contributed toward an indictment of Steinman, this indictment was not the "cause" of Steinman's decision to cooperate, and it is further argued that in "no legally significant sense" did Kurzer's testimony lead the government to Steinman. In short, the government asserts that the district court factually and legally erred when it decided that Kurzer's indictment was not based upon sources independent of Kurzer's immunized testimony.

Appellee submits that these two arguments misconstrue both the lower court's opinion and the decisions construing Kastigar. Under the rubric of "legal cause" the government seeks to have this court re-evaluate facts surrounding Kurzer's testimony and his subsequent indictment. The application of appellant's "causation" theory will necessitate an inquiry into the consciousness of Steinman because the government wants this court to evaluate Steinman's motivation. After what has been said in Kastigar, this is a clearly unwarranted exercise.* A theory which is founded on an individual's subjective perceptions is a serious departure from the spirit, if not the letter, of Kastigar. Support for this proposition is found in the cases interpreting Kastigar.

In United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973), the court was unwilling to probe the depths of the prosecutor's psyche. Because the reading of an immunized transcript may have had some effect on the government's

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* During rehearing Judge Lasker said in this regard, "The question isn't whether Mr. Steinman had an animus against Mr. Kurzer. The question is whether Mr. Kurzer's information to the government and the grand jury set going a chain of events which resulted in a situation different from the situation which would have existed had he said nothing at all." (A. 457). It is submitted that for the court to be required to base its decision in this case on what Moe Steinman testifies his state of mind to be would be most dangerous as precedent. Particularly this is so in light of the very favorable agreement he was able to negotiate with the government concerning his cooperation. Steinman's testimony regarding "motivation" could be given little, if any, weight by the court in any event.

handling of the witness' later indictment, the court obviously felt the strict requirements of Kastigar could not be met.

> Because the trial court apparently failed to consider the immeasurable subjective effect of the prosecutor's reading of McDaniel's state grand jury testimony, we conclude that the court's finding that the government had fulfilled the burden of proof required by Kastigar cannot stand. ... But even so, the United States Attorney is subject to human frailties. Thus, although he asserts that he did not use McDaniel's testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case. 482 F.2d 305, 312 (1973).

The court reached this conclusion despite the voluminous evidence put forward by the government supporting its proposition of an independent basis for McDaniel's indictment. In addition, Judge Metzner in United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y. 1973), rev'd on other grounds, 491 F.2d 473 (2d Cir. 1974), basically held that "subjectivism" should play no part in this area."*

Finally, appellant states that Kurzer wishes to establish a rule that prosecutorial access to immunized

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* Although basing its argument herein on the importance of "what motivated" Moe Steinman to cooperate, appellant at the same time urges on this court a contention which is totally inconsistent with this proposition. At page 17 of the government's brief, appellant argues that a witness should not be a "fruit" of compelled testimony because of the difficulty in evaluating his motivation.

testimony of a defendant would forever bar prosecution. No such rule was applied by Judge Lasker. Certainly access by the prosecutor to immunized testimony is one factor which must be considered when a court attempts to determine if an impermissible use has occurred.

> The facts here thus do not compare with those in United States v. Catalano, 491 F.2d 268, 272 (2d Cir. 1974), in which the Court of Appeals for this circuit held that Kastigar's requirements had been met. There the government demonstrated that it had extensive knowledge of the information used to obtain the indictment against the defendant prior to granting the defendant use immunity. Here, by contrast, the government makes no claim that, before questioning Kurzer, it had any lead to evidence against him. (A. 359)

Appellant also relies on Goldberg v. United States, 472 F.2d 513, 516 (2d Cir. 1973). There this court held that a potential defendant in a related proceeding who had been granted statutory immunity (18 U.S.C. §6002) could be compelled to testify before a grand jury. The court did not decide whether any improper use had been made of immunized testimony; in the majority's words, "that question is not now before us, and may never be." 472 F.2d at 516. The Goldberg majority, with the "enthusiastic" support of Judge Oakes (concurring), suggested that prosecutors certify all evidence available to them prior to taking of compelled testimony. 472 F.2d at 516. Here the district court found, and the

government concedes, that no evidence against Harry Kurzer existed prior to his immunized statements.

POINT II

THE GRANT OF IMMUNITY WAS NOT VITIATED BECAUSE THE GOVERNMENT NOW CLAIMS THAT KURZER MAY HAVE LIED

Appellant contends that even if it made use of Kurzer's immunized statements and testimony, nevertheless it should be allowed to use his immunized testimony against him because he lied. In effect, the government is contending that Kurzer was never really granted immunity at all. This argument is now raised for the first time and it is frivolous.

18 U.S.C. §6002 specifically provides that no testimony or information compelled under the grant of immunity may be directly or indirectly used "against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order." Section 6002 thus prohibits the use of compelled testimony in the prosecution of the underlying crime which had been the subject of the investigation. See Shotwell Mfg. Co. v. United States, 371 U.S. 341, 350 n.10 (1963). United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974), cert. denied, 419 U.S. 1079 (1974), which the government relies on, involved the use of a witness' immunized grand jury testimony in an unrelated prosecution for perjury

against him. This court specifically stated that the compelled grand jury testimony could not be used against the witness in the prosecution of the underlying crime which had been the subject of the investigation. United States v. Tramunti, supra, at 1344, n.5.

The instant indictment does not charge perjury or giving a false statement, but rather involves the matters discussed under immunity during the investigation. The government cannot use the immunized testimony against Kurzer in the trial of this indictment nor could it use the compelled testimony to obtain the indictment. While the government may now feel that Kurzer lied,* it has recourse under the exceptions stated in §6002.

CONCLUSION

The orders of the district court should be affirmed.

Dated: New York, New York
March 5, 1976

Respectfully submitted,

NEAL J. HURWITZ
Attorney for Appellee
745 Fifth Avenue
New York, New York 10022

* Kurzer has entered a not guilty plea to this indictment, and the mere allegation by the prosecutor that he lied is not sufficient to make it so.

APPENDIX

February 2, 1972

Frank S. Hogan, Esq.
District Attorney, County of New York
155 Leonard Street
New York, New York

Attention: Franklin Snitow, Esq.

Re: Harry Kurzer

Dear Mr. Snitow:

This will confirm our agreement that any information or statements made by Mr. Harry Kurzer during informal interviews with members of the staff of the District Attorney's office, both attorneys and investigators, will not be used in any manner in any prosecution, but will be treated as if given under a grant of immunity. In this connection, we wish to inform you that Mr. Kurzer has been served with a Grand Jury Subpoena, returnable on February 8, 1972.

Very truly yours,

Neal J. Hurwitz

CONSENTED TO:

_____
Franklin Snitow

NJH:pm

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

- against -

HARRY KURZER,
APPELLEE,

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Velma N. Howe *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11216

That on the 9th *day of* March *1976, deponent served the annexed* Brief

upon 1) Robert Fiske Jr.
~~2) Robert M. Bork~~ *attorney(s) for*

Appellant *in this action, at* 1 St. Andrews Plaza, New York, New York
2) ~~Dept of Justice, Washington, D.C. 20530~~

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 9th *day of* March *19*76.

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Velma N. Howe

VELMA N. HOWE